

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



76-2133

To be argued by  
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

THOMAS PULVER, :

Petitioner-Appellant, :

-against- :

JOHN CUNNINGHAM, Warden, New York :  
City Correctional Institution for :  
Men, :

Respondent-Appellee. :

-----X

BRIEF FOR RESPONDENT-APPELLEE

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City Correctional Institution for  
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Respondent-Appellee.

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BRIEF FOR RESPONDENT-APPELLEE

Statement

Petitioner-appellant appeals from a decision of the United States District Court for the Southern District of New York, Ward, J., denying his application for a writ of habeas corpus. The opinion dated September 21, 1976, is reported at 419 F. Supp. 1221.

### Questions Presented

1. Did the District Court properly find that petitioner had sufficient opportunity to litigate his claims in state court and thus was precluded from his claims de novo by Stone v. Powell?

2. Did the state court's determination of petitioner's claims preclude further inquiry by the federal courts?

3. Did petitioner abandon the contraband so there was no illegal search and seizure?

### Facts

Petitioner was incarcerated pursuant to a judgment of conviction for possession of stolen property in the second degree of the Supreme Court of the State of New York, New York County (Backer, J.), rendered on May 19, 1971, after a trial by jury. He was sentenced to a one year term of imprisonment. The judgment of conviction was affirmed by the Appellate Division, First Department on September 25, 1973, 42 A D 2d 927. Permission to appeal to the Court of Appeals was denied on December 18, 1973.

Petitioner's sentence expired on July 8, 1975.

At the pre-trial suppression hearing held on petitioner's motion to suppress the introduction of the three boxes that he had tossed out of the window, Detective Henry Jacob testified that he first knocked on the door of the apartment in question (M10).<sup>\*</sup> He further testified that he identified himself as a policeman (M11); that petitioner and his co-defendant Bonica opened the door partially and then shut it; that he heard someone moving around inside the apartment and that he went down the hall to a window that faced a fire escape (M11). He then saw three boxes being thrown from petitioner's window (M12) which was on the sixth story (M13). Jacob went down to get the box (M13) and then (M14) brought them up. He found that they contained adding machines when he picked them up (M19). His partner, Detective Schumacher, was still outside of the apartment. They knocked on the door again and the petitioner and his co-defendant opened the door (M14). After they entered the apartment, they told the petitioner and his co-defendant that they were under arrest (M52).

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<sup>\*</sup> Page references preceded by "M" are to the pre-trial suppression held before Justice Helman on October 29, 1970.

Detective Gerrard Schumacher then testified that he had knocked on the door and identified himself. The door then opened slightly (M58). He and his partner knocked again and heard a window inside the apartment being opened. They ran to the hall window and saw cartons being thrown out of the apartment window (M58). He ran back to the apartment door, pounded on the door and demanded admittance (M59). Jacob then came back with the cartons (M60). Then, after constant knocking, the petitioner opened the door (M61).\*

Neither petitioner nor Bonica testified at the suppression hearing.

Justice Nathaniel Helman made extensive findings in denying the motion to suppress (M91-97). He found that no matter or contraband had been obtained from a search and seizure (M91), and that petitioner had intentionally abandoned the cartons.

The trial took place before Justice Frederick Backer. Before the jury was called in, a Huntley hearing was held on an admission made by petitioner to Detective Jacob. Detective Jacob was the sole witness. Petitioner

\* Petitioner also states that he opened the door of the apartment in his petition to the court below, p. 25.

did not testify. Jacob testified that he had advised the petitioner, after his arrest, of his Miranda rights and that petitioner responded that he understood (T68);\* that petitioner then answered his question, "Why did you throw the machines out the window?" with "They were the only things here with serial numbers" (T69). Petitioner's attorney argued that his statements had been made because his will had been overpowered (T70). The Court found that the voluntariness of the admission had been established beyond a reasonable doubt (T81).

At the trial, Detectives Jacob and Schumacher testified to the same essential facts, with somewhat more detail, as they had at the pre-trial suppression hearing.\*\* Detective Jacob testified that he saw petitioner and his co-defendant carry some green and white cartons into a

\* Page references preceded by a "T" refer to the trial transcript.

\*\* In his brief to the Appellate Division, Appendix C, to petitioner's Memorandum filed in the District Court, p. 44, petitioner states that the testimony of the two detectives at the suppression hearing "was generally as given by them upon the trial". A complete copy of petitioner's Appellate Division brief is being filed by respondent with this Court.

building (T86); that when they arrived at the apartment, Schumacher knocked on the door; petitioner opened it slightly; they showed him their police shield and petitioner closed the door again (T87). Both detectives then went to the hall window (T88) from where they saw the cartons thrown out of the apartment window (T89). Jacob retrieved the boxes and went upstairs. After a time, petitioner opened the door and the detective entered (T94).

Detective Schumacher testified to the same essential facts (T166-68, 170-71). His testimony about his pounding on the door referred to the period after the boxes had been thrown from the window (T168). Petitioner opened the door (T170-71) about one-half hour after the detective first arrived at the door (184-85).\*

The motion to suppress was renewed at the end of trial on the ground that the detectives did not see anything thrown out of the petitioner's windows (T322-323a). It was denied (T323-323a).

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\* In light of the facts as set forth in the suppression hearing and at trial by the two detectives, who were the only witnesses to the abandonment of the boxes who testified at any time, petitioner's characterization of the facts and especially the motives of the parties is without any basis on the record. See Memorandum for petitioner, p. 31.

Petitioner and his co-defendant were found guilty by a jury.

The District Court (Ward, J.) denied the petition on the ground that petitioner had had a full and fair opportunity to litigate his claims before the New York Appellate Courts and his petition, therefore, was precluded by Stone v. Powell, \_\_\_ U.S. \_\_\_ 49 L. ed 2d 1067 (1976).\*

POINT I

THE DISTRICT COURT PROPERLY FOUND THAT PETITIONER HAD SUFFICIENT OPPORTUNITY TO LITIGATE HIS CLAIMS IN THE STATE COURT AND THUS WAS PRECLUDED FROM RAISING HIS CLAIMS DE NOVO BY STONE V. POWELL.

Petitioner's argument is that the Appellate Division did not consider his constitutional claims on the merits; that he, therefore, did not have a fair opportunity to litigate his claims; and that Stone v. Powell, supra, does not bar the instant petition. He appears to concede that if the Appellate Division did consider his claims on the merits, that his petition is barred by Stone v. Powell, supra.

\* In a petition brought on behalf of petitioner's co-defendant, Eugene Bonica, the District Court (MacMahon, J.) found that the search and seizure of petitioner and his co-defendant was constitutional. The opinion, No. 40651, dated April 29, 1974, is set forth as Appendix F to petitioner's memorandum to the Court below.

Petitioner attempts to support his assertion that the Appellate Division did not decide his claims on the merits with the argument that it did not write an opinion resolving the conflicts in the facts and the law presented by the two parties.

Petitioner claims that he presented the facts and the law to the Appellate Division as they really were but that the People obfuscated and ignored the crucial testimony. Thus, petitioner claims the Appellate Division did not truly consider the issues.

Petitioner's claim is singularly without merit. It is elementary that opposing briefs almost always have different views of the law and often different interpretations of the facts. That a Court does not write an opinion resolving the differences does not mean it did not consider the merits. Indeed, this Court often affirms without opinion judgments of the District Court. Surely, petitioner does not mean that this Court's doing so indicates that this Court does not read the record, weigh the arguments of both parties and decide the merits against the appellant.

Petitioner does not claim that the complete record was not before the Appellate Division or that he was precluded in any manner from presenting the legal and factual arguments in support of his case. The conclusion is inescapable that petitioner had ample opportunity to litigate his claims before the Appellate Division. Thus, as the District Court held, his petition for federal habeas corpus is barred by Stone v. Powell, supra.

Petitioner, moreover, had, and took advantage of, a fair opportunity to litigate his claims before the trial court. The statement of the Court below that the State suppression hearing failed to adduce the material facts is not supported by the record.

First, petitioner in his brief to this Court, states (at pp. 20-21) that he presented all the correct facts to the Appellate Division. But, in his brief to the Appellate Division, petitioner stated (at p. 44) that the testimony of Detectives Jacob and Schumacher at the suppression hearing was "generally as given by them upon the trial". Thus, petitioner should be estopped from arguing at the same

time that all the material facts were not presented at the suppression hearing.\*

Second, assuming arguendo that the facts presented at trial were different from those presented at the pre-trial suppression hearing, the responsibility to lay all the facts before the Court at the pre-trial suppression hearing must be the petitioner's. If the petitioner disagreed with the testimony of the detectives who testified at the pre-trial suppression, he should have taken the stand himself.\*\* He had ample opportunity to present the "facts" as he claims they were at the pre-trial hearing. The jury was not present. Petitioner may not withhold testimony from the pre-trial suppression hearing, which is the procedure established by New York State to determine the legality of Fourth Amendment claims (New York Criminal Procedure Law, Article 710) and then claim that Stone v. Powell, supra, does not preclude his writ since he did not have an opportunity for a fair hearing. New York provided an opportunity. Petitioner did not take it. A similar argument was rejected

\* The record demonstrates that when petitioner renewed his suppression motion at the end of trial it was not because of changed testimony at trial with respect to the force used by the detectives but because petitioner claimed that the photographs introduced at trial proved that the detectives could not see anything thrown out of the windows (T323-323a).

\*\* The testimony of the two detectives was the only testimony at the pre-trial suppression. Petitioner's co-defendant, Bonica, also did not testify.

by this Court in Holland v. County Court of Nassau County,  
(76 C 356, E.D.N.Y., July 21, 1976) affd. on opinion of  
District Court (2d Cir., 76-2084, Nov. 24, 1976).

In any event, it is clear that "the State has  
provided [petitioner] an opportunity for full and fair liti-  
gation of [his] Fourth Amendment claim". 49 L. ed 2d at  
1080, and his petition was properly dismissed by the District  
Court.

#### POINT II

#### THE STATE COURT DETERMINATION OF PETITIONER'S CLAIMS PRE- CLUDE FURTHER INQUIRY BY THE FEDERAL COURTS.

Petitioner's motion to suppress the contraband was  
denied by two judges (Helman and Backer). The Huntley  
hearing found that his admission was voluntary.

It is well-settled that under 28 U.S.C. § 2254(d),  
a factual determination of a state court must be presumed to  
be correct in a federal habeas corpus proceeding. The burden  
is on the petitioner to establish, by convincing evidence,  
that the factual determination of the state court is

erroneous. United States ex rel. Stanbridge v. Zelker, 514 F. 2d 45 (2d Cir., 1975); United States ex rel. Regina v. LaVallee, 504 F. 2d 580 (2d Cir., 1974); United States ex rel. Coleman v. Mancusi, 423 F. 2d 985 (2d Cir., 1970).

The petitioner may not merely seek a re-examination of facts already probed by the state court. United States ex rel. Stanbridge v. Zelker, supra. Petitioner has not successfully met any of the exceptions of 28 U.S.C. § 2254(d) that would permit a re-examination of the facts found by the state courts.

That abandonment is a factual question is shown by Mullins v. United States, 487 U.S. 581, 588 (8th Cir., 1975), where, quoting from Friedman v. United States, 347 F. 2d 697, 704-06 (8th Cir.) cert. den. 382 U.S. 946 (1965), the Court stated:

"Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. How did the person who was supposed to have abandoned the property act, that is, what did he do, and second what was his intention? These call for factual determinations."

Justice Helman's factual determination (M91-97) and that of Justice Backer at the end of trial (T323-323a) should be presumed correct and determinative of the issue. See LaVallee v. DelleRose, 410 U.S. 690 (1973) (per curiam); United States ex rel. Lewis v. Henderson, 520 F. 2d 896 (2d Cir.) cert. den. 423 U.S. 998 (1975).\*

Similarly, the Huntley court's determination (T81) that petitioner's admission was voluntary must be presumed correct. United States ex rel. Lewis v. Henderson, supra; United States ex rel. Cronan v. Mancusi, 444 F. 2d 51 (2d Cir., 1971). The record here is sufficient to justify the Huntley court's factual determination. United States ex rel. Caster v. Mancusi, 414 F. 2d 743 (2d Cir., 1969).

\* Petitioner himself has conceded that the facts developed at the suppression hearing were essentially the same as those developed at the trial. See his brief to the Appellate Division, p. 44 (Appendix C to his Memorandum to the District Court). Moreover, his motion to suppress received at the end of trial did not contest the substantive testimony of the detectives at the suppression hearing. Thus, the dictum of the District Court that the State Court failed to adduce the material facts is clearly erroneous.

Just as a consent to search question is a purely factual issue, United States v. Wiener, 534 F. 2d 15 (2d Cir., 1976), the voluntariness of petitioner's admission is a purely factual issue. There is no evidence that Justice Backer applied the wrong constitutional standard. His finding of voluntariness must be presumed correct since it is fairly supported by the record as a whole. LaVallee v. DelleRose, supra.

#### POINT III

PETITIONER ABANDONED THE CONTRABAND;  
THERE WAS NO ILLEGAL SEARCH OR  
SEIZURE.

By petitioner's own argument, the only time period relevant to the issue of the abandonment of the contraband is the period before petitioner actually threw the three boxes from a sixth story window. The record demonstrates that all that had occurred prior to that was some heavy knocking on the door by two detectives. Petitioner had opened the door once and had shut it again. The heavier pounding did not occur until after Detective Jacob had retrieved the boxes, that is, after petitioner had abandoned them. The legality of the arrest itself is not at issue and was never presented

to the state court. Petitioner admits that he opened the door himself. Petition, page 25.

This case falls squarely within the holding of Harris v. United States, 390 U.S. 234 (1968) (per curiam) where the court stated at 236:

"It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. Ker v. California, 374 U.S. 23, 42-43 (1963); United States v. Lee, 274 U.S. 559 (1927); Hester v. United States, 265 U.S. 57 (1924)"

In Hester v. United States, supra, agents without arrest or search warrants went to the defendants' house, saw the defendants, ran after them and saw them drop the contraband. The court found that the defendants' own acts disclosed the contraband and that the agents did not examine it until after it was abandoned.

There has been no question that the detectives were at a window in a public hallway when they saw the petitioner throw the three heavy boxes out of a sixth story window. Nothing can be a clearer abandonment.

Nothing more happened here than in Kleinbart v. United States, 439 F. 2d 511 (D.C. Cir., 1970) where without a warrant, a detective knocked on a hotel room door; the occupant told him to wait and then threw a bottle out of the window. In Kleinbart, unlike here, the detectives actually forced the door open. Yet, the court found that the defendant had abandoned the contraband by tossing it from the window.

In United States v. Wilson, 492 F. 2d 1160 (5th Cir., 1974) cert. den. 419 U.S. 858, the defendants threw bags of marijuana out of a car window. The court found that:

"The bags of marijuana when recovered were no longer in possession of defendants but were in plain view on a public highway. Thus there was neither search nor seizure, illegal or otherwise."

Similarly, here there was no search or seizure prior to the petitioner's getting rid of the boxes. See, Jackson v. United States, 301 F. 2d 515 (D.C. Cir.) cert. den. 369 U.S. 659 (1962); Vincent v. United States, 337 F. 2d 891 (8th Cir., 1964) cert. den. 380 U.S. 988 reh. den. 381 U.S. 947 (legality of arrest irrelevant where narcotics abandoned by defendant).

The cases cited by petitioner all involved a deceptive entry by the arresting officer or a forced entry concomitant with the abandonment. In Hobson v. United States, 226 F. 2d 890 (8th Cir., 1955), not only had the defendants thrown the material out into their own yard thus violating no law, but the arresting officers forced their way in.

Here, all that there had been was some heavy knocking on the door before petitioner abandoned the cartons. Petitioner eventually opened the door himself. The detectives never forced the door open. Petitioner also recklessly threw three heavy boxes into public areas, and, in fact, damaged a car, a crime itself.

In Lawrence v. Henderson, 478 F. 2d 705 (5th Cir., 1973), an actual illegal arrest made the defendant conceal the contraband.

In Fletcher v. Wainwright, 399 F. 2d 62 (5th Cir., 1968), the contraband was thrown out of the window when the police began kicking down the door. In United States v. Merritt, 293 F. 2d 742 (3d Cir., 1961) the police entered with an invalid warrant. In United States v. Newman, 490 F. 2d 993 (10th Cir., 1974), the agent indiscriminately stopped the car before the contraband fell out of the truck.

The significant act here was petitioner's throwing three heavy boxes from a sixth floor window into a public area. Prior to that, the police officers had merely knocked heavily on his door. Petitioner had successfully thwarted their entering and continued to do so. He later voluntarily opened the door for them.

In United States v. Miller, \_\_\_ U.S. \_\_\_, 48 L. ed 2d 71 (1976), where the defendant alleged that a defective subpoena had resulted in his bank's disclosing his records,

the court reiterated its statements in Katz v. United States, 389 U.S. 347 (1967) that:

"'what a person knowingly exposes to the public. . . is not a subject of Fourth Amendment protection.'  
Id. at 351."

Nothing could have been more knowingly exposed to the public than the three boxes that petitioner tossed out of his window. He cannot have a "legitimate expectation of privacy" in those boxes and thus, cannot complain that they were introduced into evidence.

It is also clear here, as was found by the state court, that the admission here was voluntarily given and free from any alleged taint.\*

\* Petitioner has not presented thy issue of the validity of his arrest and any fruits thereof to either the state trial courts or the Appellate Division. This conclusion is supported by the trial minutes and the parties' Appellate Division briefs. This failure to exhaust his state remedies with respect to this issue precludes its consideration at this time. Picard v. Connor, 404 U.S. 270 (1972).

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT  
SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York  
December 22, 1976

Respectfully submitted,

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